

May 2019

# Italian Competition Law Newsletter

## Highlights

- The ICA clears SKY’s acquisition of Mediaset Premium’s DDT platform R2 subject to remedies, despite the notification’s withdrawal and the return of R2 to Mediaset Premium after the notification of the Statement of Objections
- The TAR Lazio annuls in part an ICA infringement decision fining maritime freight transport operators Moby and CIN for an alleged abuse of dominance

## The ICA clears Sky Italia’s acquisition of Mediaset Premium’s DTT Platform R2 subject to remedies

On May 20, 2019, the Italian Competition Authority (the “ICA”) issued a decision in the merger control proceedings opened in connection with Sky Italia S.r.l.’s (“**SKY**”) acquisition of control over R2 S.r.l. (the “**Decision**”).<sup>1</sup> Owned by Mediaset Premium S.p.A. (“**MP**”), R2 S.r.l. (“**R2**”) provides technical and administrative platform services for broadcasting by means of Digital Terrestrial Television (“**DTT**”).

The Decision cleared the notified transaction, albeit imposing remedies on SKY.

### The notified transaction and the opening of proceedings

SKY notified the acquisition of R2 on November 28, 2018. On March 7, 2019, the ICA opened an in-depth investigation into the transaction,<sup>2</sup> alleging that SKY’s acquisition of sole control over R2 (the “**Transaction**”) was part of a set of

arrangements between SKY and MP – concluded on March 30, 2018 – that had “*technical-functional*” and “*economic-contractual*” links with the Transaction.

According to the ICA, the Transaction was capable of lessening competition in the market for retail pay-TV services, in which SKY and MP were the main players, by providing an incentive for MP to exit the market, and had the same effects as an acquisition of the whole of MP by SKY. The market for retail pay-TV services includes, in the ICA’s view, broadcasting through satellite (direct-to-home, DTH), DTT and the Internet. The ICA considered that the Transaction could potentially hinder competition also in the markets for: (i) wholesale access services to DTT technical platforms, (ii) the wholesale licensing of broadcasting rights, and (iii) the wholesale supply of pay-TV channels.

<sup>1</sup> SKY ITALIA/R2 (Case No. C/12207), ICA Decision of May 20, 2019.

<sup>2</sup> ICA Decision No. 25579 of March 7, 2019.

## The withdrawal of the notification and the ICA's assessment

Since the parties were not subject to a standstill obligation as a matter of law,<sup>3</sup> they completed the Transaction after notification, and SKY acquired sole control over R2 before the ICA completed its assessment. However, the Transaction included a condition subsequent to allow SKY to return R2 to MP if the ICA adopted a prohibition or a conditional decision on the merger. Following notification of the statement of objections, SKY withdrew the notification and R2 was demerged back into MP. As a result of the return of R2 to MP, R2's platform was opened to third-party access.

Despite the notification's withdrawal and the return of R2 to MP, the ICA took the view that the demerger only partially restored the situation to the *status quo ante* (i.e., the situation before the Transaction) and did not remove the anti-competitive effects that the notified Transaction had generated in the meantime.

The ICA found that, even after the return of R2 to MP, SKY maintained control of some of R2's assets (some employees, contracts and fixed assets). Moreover, the return of R2 did not include other assets that allegedly had been transferred to SKY, such as the exclusive rights to broadcast MP channels on DTT. The Decision also found that SKY had modified certain R2 assets (i.e., conditional-access modules).

Regarding the irreversible anti-competitive effects, the Decision found that, although the Transaction did not formally concern the acquisition of the whole of MP, it had similar effects, namely the migration of some MP subscribers to SKY and the elimination of the competitive constraints previously exercised by MP. According to the ICA, this, in turn, strengthened SKY's position in the pay-TV market as well as in the markets for the licensing of broadcasting rights and the supply of pay-TV channels, where SKY would become the only purchaser of content and channels on both the DTH and DTT platforms.

## Remedies

In the ICA's view, the whole structure of the Transaction and the ancillary agreements between the parties appeared to be directed at fragmenting the effects of the concentration and reducing the effectiveness of the ICA's merger review powers. The ICA asserted that the only means it had to protect competition was to properly restore the *status quo ante* through the imposition of remedies,<sup>4</sup> to protect over-the-top Internet operators and potential new DTT entrants, which would have been the only players left to exercise competitive constraints on SKY.

Therefore, in authorizing the Transaction, the ICA imposed the following measures on SKY, for a period of three years as of notification of the Decision (the "**Remedies**"):

- An obligation not to conclude new contracts for the acquisition of broadcasting rights and linear pay-TV channels edited by third parties on an exclusive basis for the Internet platform in Italy;
- An obligation to grant third parties access on a fair, reasonable, non-discriminatory and cost-oriented basis to any new proprietary DTT platform that SKY may set up, to the extent that the platform in question is "compatible with the R2 assets" that SKY modified during the time in which it exercised control over the R2 platform;
- An obligation on SKY not to use information and assets belonging to R2 and already acquired for SKY's pay-TV offers;
- An obligation to designate, within two months of the Decision, a trustee to verify SKY's compliance with the Remedies;
- An obligation to draw up and submit to the ICA, within three months of the Decision and each year thereafter, reports setting out the actions taken by SKY to comply with the Remedies.

<sup>3</sup> Pursuant to Article 16 of Law 287/90.

<sup>4</sup> Pursuant to Article 18(3) of Law 287/90.

## The ICA fines bid-rigging practices in facility maintenance services in Italy

On April 17, 2019, the ICA found that 19 undertakings allegedly participated in a cartel that affected the outcome of the so-called “Facility Management 4” tender procedure, the biggest European public tender for the provision of cleaning and maintenance services for public offices ever to be launched in Italy (by Consip, the central purchasing agency owned by the Ministry for Economy and Finance).<sup>5</sup> The said tender was divided in 18 geographical lots and had a total value of approximately €2.7 billion.

During the investigation, the ICA cooperated with public prosecutors, who were investigating the same conduct in connection with criminal proceedings in Milan and Rome, and relied on a leniency application submitted by one of the undertakings.

The ICA found that the four main market players led as many distinct temporary associations of undertakings – so-called ATIs<sup>6</sup> – that exchanged information about the bidding strategy in meetings, and through subcontracting and consortia. This exchanges were part of a concerted practice by which the ATIs submitted bids that never overlapped, according to a “chessboard” pattern.<sup>7</sup>

The ICA concluded that the infringement constituted a hardcore restriction of competition under Article 101 TFEU, and ICA issued fines against the investigated companies of approx. €235 million in total. The leniency applicant benefited from a 50% reduction in its fine.

## The TAR Lazio annuls in part an ICA infringement decision finding an alleged abuse of dominant position in the maritime freight transport sector

On May 22, 2019, the Regional Administrative Court for Latium (the “**TAR**”) accepted in part the application for annulment of an ICA decision addressed to maritime carriers Moby and CIN, finding a violation of Article 102 TFEU (the “**Decision**”).<sup>8</sup>

### Factual background

The Decision, adopted on February 28, 2018, found that Moby and its wholly-owned subsidiary CIN abused their dominant position on certain maritime freight transport routes connecting Sardinia and North-Central Italy, by engaging in an exclusionary strategy targeting certain of their competitors.

In particular, the ICA found that Moby and CIN boycotted logistics operators that entered into business relations with rival ferry operators (“**disloyal logistics operators**”) by applying to them retaliation measures and unfavorable economic and commercial conditions against them (e.g., refusals of boarding and early termination of contracts; so-called “**direct boycott**”); whereas they applied, at the same time, more favorable economic and commercial conditions to logistics operators that abstained from entering into business relations with rival ferry operators (“**indirect boycott**”).

<sup>5</sup> *Gara Consip FM4* (Case I808), ICA Decision of May 17, 2019.

<sup>6</sup> *Associazioni Temporanee di Imprese*.

<sup>7</sup> The ICA found overlapping bids in only two cases. However, those overlaps were intentionally made to simulate competitive behaviour.

<sup>8</sup> *Maritime transport of goods from and to Sardinia* (Case A487), ICA Decision of February 28, 2018.

The ICA thus issued a cease and desist order, and fined Moby and CIN jointly and severally in the amount of approx. €29 million.

## Judgments

The TAR agreed with the ICA on the existence of the direct boycott, but annulled the parts of the Decision relating, respectively, to the indirect boycott, and the anticompetitive effects of the contested conduct. The judgment emphasizes that the ICA has a duty to rebut in its final decision the arguments raised by the parties in the course of its investigation, and must support its allegations with strong evidence and empirical analysis.

### *Indirect boycott*

The applicants submitted that the ICA did neither find that Moby's and CIN's indirect boycott conducts amounted to unlawful fidelity rebates, nor demonstrate that it could realistically prevent logistics companies from switching to rivals. Accordingly, the Decision could not establish that these actions amounted to abusive conduct within the meaning of Article 102 TFEU.

The TAR took the view that indirect boycott amounted to fidelity rebates. In line with the principles established by the EU Court of Justice in *Intel*,<sup>9</sup> the TAR stated that the ICA was required to analyze the conditions and arrangements for granting the rebates, their duration and their amount, and to assess the possible existence of a strategy aiming to exclude from the market competitors that were at least as efficient as Moby and CIN. However, in the TAR's view, the ICA failed to assess whether the rebates were defensive in nature, and were replicable by rivals (i.e., were not lower than the average cost of the service). The TAR concluded that, in the absence of this necessary factual analysis, the ICA could not substantiate its allegations as to the existence of an abusive exclusionary strategy merely by reference to its own interpretation of certain documents.

### *Absence of anticompetitive effects*

In the same vein, the TAR held that the ICA failed to carry out an adequate investigation and to provide a convincing statement of reasons for its conclusion that the unlawful conduct affected logistics operators as well as Grendi, a competing maritime freight carrier.

According to the TAR, the ICA: (i) did not properly rebut the fact that the disloyal logistics operators increased their combined profit more than the loyal logistics companies; and (ii) did not base on any empirical analysis its finding that Grendi's bad economic performance was the result of the alleged boycotting conduct.

### *Reduction of the fine*

Based on the above, the TAR disagreed with the ICA's calculation of the fine in that:

- the 9% percentage of the value of the relevant services used by the ICA as a basis for the calculation of the basic amount of the fine must be reduced; and
- since the ICA did not characterize the alleged infringement as one of the most serious types of restrictive conduct, it was wrong to apply a 15% entry fee.

Moreover, the TAR found that the Decision overestimated the duration of the infringement because the ICA erroneously considered that the unlawful conduct was still ongoing when it adopted the Decision, whereas it had stopped in January 2017 (according to the Decision, the infringement thus lasted 2 years and 5 months, from September 2015 to February 2018).

Instead of re-determining the amount of the fine, the TAR ordered the ICA to carry out a new calculation in compliance with the principles established in the judgment. In all likelihood, the final amount of the new fine will be significantly lower.

<sup>9</sup> *Intel*, C-413/14 P, ECLI:EU:C:2017:632, § 139.

---

**AUTHORS**

**Alessandro Comino**  
+39 02 7260 8264  
[acomino@cgsh.com](mailto:acomino@cgsh.com)



**Natalia Latronico**  
+39 02 7260 8666  
[nlatronico@cgsh.com](mailto:nlatronico@cgsh.com)



**Chiara Militello**  
+39 06 6952 2613  
[cmilitello@cgsh.com](mailto:cmilitello@cgsh.com)



**Chiara Neirotti**  
+39 02 7260 8644  
[cneirotti@cgsh.com](mailto:cneirotti@cgsh.com)



**Michael Tagliavini**  
+39 06 6952 2824  
[mtagliavini@cgsh.com](mailto:mtagliavini@cgsh.com)



**Ilaria Tucci**  
+39 06 6952 2674  
[itucci@cgsh.com](mailto:itucci@cgsh.com)

---

**EDITORS**

**Giulio Cesare Rizza**  
+39 06 6952 2237  
[crizza@cgsh.com](mailto:crizza@cgsh.com)

**Gianluca Faella**  
+39 06 6952 2690  
[gfaella@cgsh.com](mailto:gfaella@cgsh.com)

---

**PARTNERS, COUNSEL AND SENIOR ATTORNEYS, ITALY**

**Marco D'Ostuni**  
[mdostuni@cgsh.com](mailto:mdostuni@cgsh.com)

**Matteo Beretta**  
[mberetta@cgsh.com](mailto:mberetta@cgsh.com)

**Giulio Cesare Rizza**  
[crizza@cgsh.com](mailto:crizza@cgsh.com)

**Gianluca Faella**  
[gfaella@cgsh.com](mailto:gfaella@cgsh.com)

**Saverio Valentino**  
[svalentino@cgsh.com](mailto:svalentino@cgsh.com)

**Fausto Caronna**  
[fcaronna@cgsh.com](mailto:fcaronna@cgsh.com)

**Luciana Bellia**  
[lbellia@cgsh.com](mailto:lbellia@cgsh.com)

**Marco Zotta**  
[mzotta@cgsh.com](mailto:mzotta@cgsh.com)

